

No. 10024

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United States  
Circuit Court of Appeals

For the Ninth Circuit.

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B. R. MORRIS, doing business as L. RIFKIN &  
SONS,

Appellant,

vs.

THE FRANKLIN FIRE INSURANCE COM-  
PANY OF PHILADELPHIA, PENNSYL-  
VANIA, a corporation,

Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the  
United States for the Southern District  
of California, Central Division.



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## NAMES AND ADDRESSES OF ATTORNEYS

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Los Angeles, California.

For Appellee:

JOSEPH F. RANK, Esq.,  
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649 South Olive Street,  
Los Angeles, California.

In the District Court of the United States, Southern  
District of California, Central Division

No. 1099-M Civil

B. R. MORRIS, doing business as L. RIFKIN &  
SONS,

Plaintiff,

vs.

THE FRANKLIN FIRE INSURANCE COM-  
PANY OF PHILADELPHIA, PENNSYL-  
VANIA, JANE COLLETTI, JOHN CASTA-  
LET, JANE VAN DEUSEN, P. C. GERNET,  
T. GROSSMAN, SHELDEN W. HYMER,  
JANE SLATE, ELENORE STAPLES  
BOEHNER, ONE DOE, TWO DOE, THREE  
DOE, FOUR DOE, FIVE DOE, SIX DOE,  
SEVEN DOE, EIGHT DOE, NINE DOE,  
TEN DOE, ELEVEN DOE, TWELVE DOE,  
THIRTEEN DOE, FOURTEEN DOE, FIF-  
TEEN DOE, SIXTEEN DOE, SEVENTEEN  
DOE, EIGHTEEN DOE, NINETEEN DOE,  
and TWENTY DOE,

Defendants.

## COMPLAINT

(Insurance Policies)

Comes now the plaintiff and for cause of action  
against the defendants, and each of them, complains  
and alleges, as follows, to-wit:



## I.

That at all times herein mentioned, the plaintiff, B. R. Morris, was and now is doing business under the fictitious firm name and style of L. Rifkin & Sons, with his principal place of business located in the City of Los Angeles, County of Los Angeles, State of California.

## II.

That prior to the commencement of this action, [1\*] plaintiff complied with Section 2466 of the Civil Code of the State of California, by filing a certificate with the County Clerk of Los Angeles County, State of California, together with an affidavit showing publication of such certificate, all as required by said section.

## III.

That the true names of the defendants sued herein as Jane Colletti, John Castalet, Jan Van Deusen, Jane Slate, One Doe, Two Doe, Three Doe, Four Doe, Five Doe, Six Doe, Seven Doe, Eight Doe, Nine Doe, Ten Doe, Eleven Doe, Twelve Doe, Thirteen Doe, Fourteen Doe, Fifteen Doe, Sixteen Doe, Seventeen Doe, Eighteen Doe, Nineteen Doe and Twenty Doe, are unknown to plaintiff, but upon ascertaining same, plaintiff will ask leave of Court to insert said true names in lieu of the fictitious names herein sued upon.

## IV.

That at all times herein mentioned the defendant, The Franklin Fire Insurance Company of Phila-

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

delphia, Pennsylvania, was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania, duly authorized and licensed to transact fire insurance business in the State of California and maintains an office in the County of Los Angeles, State of California.

#### V.

That plaintiff is a citizen of the State of California, and the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, is a citizen of the State of Pennsylvania; that the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand and no/100ths (\$3,000.00) Dollars.

#### VI.

That on the 14th day of September, 1939, the defendant, The Franklin Fire Insurance Company of Philadelphia, [2] Pennsylvania, in consideration of the sum of Fifty and no/100ths (\$50.00) Dollars and premiums thereafter to be paid, executed and delivered to plaintiff its policy of insurance in writing known as Furriers' Customers Basic Policy in a provisional amount to the extent of Twenty Thousand and no/100ths (\$20,000.00) Dollars for merchandise located in storage rooms, vaults and safes and to the extent of Ten Thousand and no/100ths (\$10,000.00) Dollars for merchandise located outside of storage rooms, vaults and safes. Said policy bore No. FC-1423, and a copy of said policy is hereto attached and marked Exhibit "A"

and hereby made a part of this complaint. That by the terms of said policy said defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, did insure said plaintiff and all the defendants except the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, from the 14th day of September, 1939, at noon, until cancellation of said insurance as in said policy provided, against all loss or damage by fire to an amount as in the policy provided as to the personal property described in said policy. That it was the intention of plaintiff and defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, that said policy of fire insurance was to cover customers' furs and garments trimmed with fur in the possession of plaintiff.

## VII.

That through the mistake of plaintiff, which mistake the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, at that time knew or suspected, said policy of insurance did not truly express the intention of the parties in that said policy of insurance covered only customers' furs and garments trimmed with fur that were accepted from customers by the assured for storage, alteration, repairing, cleaning or remodeling, and for which the assured issued a receipt under which the assured agreed to effect insurance on such property; that it was the [3] intention of plaintiff, which intention the defendant, The Frank-

lin Fire Insurance Company of Philadelphia, Pennsylvania, at that time knew or suspected, not to limit said insurance policy to such furs and garments for which the assured issued a receipt and under which the assured agreed to effect insurance on the property and not to limit the liability of said company under said policy to the amount stipulated in the assured's receipt as applying to each respective article, whether on account of the assured's legal liability or otherwise.

### VIII.

That said policy should be revised so as to express the intentions of the parties by excluding from the policy the following provisions, to-wit:

“This policy only covers Furs, or garments trimmed with Fur, being the property of customers, accepted by the Assured for storage, alteration, repairing, cleaning or remodeling, and for which the Assured issues a receipt under which the Assured agrees to effect insurance on the property.

“This Company shall not be liable hereunder for more than the amount stipulated in the Assured's receipt as applying to each respective article, whether on account of the Assured's legal liability or otherwise.”

and in lieu of the above provisions insert the following provisions, to-wit:

“This policy only covers Furs, or garments trimmed with Fur, being the property of customers in the possession of plaintiff.” [4]

### IX.

That plaintiff was not aware of the above provisions being in said policy and said provisions were not called to the attention of plaintiff. No proper forms or receipts were furnished to plaintiff by the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, although it is customary to furnish such forms under such a policy where the above terms are intended to be enforced as a part of the policy. That plaintiff pursuant to the terms of the above policy reported to the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, not later than the fifteenth day of every month the total amount at risk under said policy on the last day of the preceding month; that the amount so reported at risk included the item herein sued on and plaintiff agreed to pay premiums thereon at the rates in the policy provided; that said defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, accepted said reports and charged a premium for insurance on the items reported including the items sued hereinunder. That by reason thereof plaintiff waived the above provisions in said policy and is estopped to rely thereon.



## X.

That on or about the 30th day of November, 1939, said property was greatly damaged by fire and a large part destroyed by fire. That plaintiff is informed and believes and therefore alleges that said personal property so destroyed was of the value of Six Thousand Seven Hundred and Twenty (\$6,720.00) Dollars; that at the time of the loss said property belonged to the following defendants: Jane Colleti, John Castalet, Jane Van Deusen, P. C. Gernet, T. Grossman, Shelden Hymer, Jane Slate, Elenore Staples Boehner, One Doe, Two Doe, Three Doe, Four Doe, Five Doe, Six Doe, Seven Doe, Eight Doe, Nine Doe, Ten Doe, Eleven Doe, Twelve Doe, Thirteen Doe, Fourteen Doe, Fifteen Doe, Sixteen Doe, Seventeen Doe, Eighteen Doe, Nineteen Doe and Twenty Doe. [5] That said individuals are by reason thereof joined as parties defendant; that said insurance was issued for the benefit of said defendants; that this lawsuit is brought for and on behalf of said defendants; that at the time of said loss said property was in the possession of and held by plaintiff.

## XI.

That the loss and damage sustained by said defendant owners by reason of said destruction and damage was Six Thousand Seven Hundred and Twenty (\$6,720.00) Dollars; that plaintiff immediately gave written notice of said fire and of said loss to the defendant, The Franklin Fire Insur-

ance Company of Philadelphia, Pennsylvania; that on or about the 22nd day of January, 1940, and within sixty (60) days from the date of said loss, the insured rendered to the defendants, The Franklin Fire Insurance Company of Philadelphia, at its main office in California a sworn proof of loss showing in detail the total loss and value of the personal property covered by said policy of The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, and showing the amount payable to said plaintiff under said policy of Six Thousand Seven Hundred and Twenty (\$6,720.00) Dollars; that plaintiff has performed all the conditions of said policy on his part to be performed.

## XII.

That thirty (30) days after receipt of said proof of loss above set forth, to-wit, on the 22nd day of February, 1940, there became due and payable from said defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, to said plaintiff and said defendant owners the sum of Six Thousand Seven Hundred and Twenty (\$6,720.00) Dollars, together with interest thereon at the rate of seven (7%) per cent per annum from April 22, 1940, on account of and under said policy of insurance and that said defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, has refused and failed to pay said amount and has not [6] paid any part of said loss to plaintiff.

Wherefore: Plaintiff prays judgment as follows:

1. That said policy of fire insurance be amended as above provided.

2. That plaintiff and the defendant owners, entitled thereto, be given judgments against defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, in the sum of Six Thousand Seven Hundred and Twenty (\$6,720.00) Dollars, together with interest thereon at the rate of seven (7%) per cent per annum from April 22, 1940.

3. For his costs of suit and for such other and further relief as to the court seems just and proper in the premises.

ZUCKERMAN AND STEIN  
By EDWARD K. ZUCKERMAN,  
Attorneys for Plaintiff. [7]

### EXHIBIT "A"

#### FURRIERS' CUSTOMERS BASIC POLICY

No. FC 1423

Stock Company

The Franklin Fire Insurance Co. of Philadelphia  
Pennsylvania

In Consideration of the Stipulations Named Herein,  
Does insure B. R. Morris DBA Rifkin and Sons,  
hereinafter called the Assured, Whose address is  
3926 Wilshire Blvd., Los Angeles, California, For  
his (their) account and for account of customers  
hereinafter described, From the 14th day of Sep-  
tember 1939, at Noon, Standard Time at place of  
issuance, until cancelled as herein provided.



### Furriers' Customers Custody Rider

This policy only covers Furs, or garments trimmed with Fur, being the property of customers, accepted by the Assured for storage, alteration, repairing, cleaning or remodeling and for which the Assured issues a receipt under which the Assured agrees to effect insurance on the property, but excluding any stock belonging to the Assured or to any subsidiaries or affiliates of the Assured.

This policy covers during transportation or otherwise while the property is in the custody or control of the Assured for alteration, repairing, cleaning, remodeling, or preparation for storage or for return to customers; and while in storage rooms, vaults or safes at locations hereinafter described.

### This Policy Insures:

Against all risks of loss of or damage to the insured property including the Assured's legal liability therefor, except as hereinafter provided.

This Policy Does Not Cover the Insured Property or the Assured's Legal Liability for:

(a) Loss or damage occasioned by gradual deterioration, moth, vermin, inherent vice; or damage sustained due to any process or while actually being worked upon and resulting therefrom unless caused by fire;

(b) Loss or damage occasioned by war, invasion, hostilities, rebellion, insurrection, confiscation by

order of any Government or Public Authority, or risks of contraband or illegal transportation or trade.

1. Warranted that the Assured shall use due diligence to maintain during the period of this policy such protective safeguards as are indicated in the proposal for this policy.

2. This Company shall not be liable hereunder for more than the amount stipulated in the Assured's receipt as applying to each respective article, whether on account of the Assured's legal liability or otherwise, nor in any event for more than the cost to repair or replace the article with materials of like kind and quality, provided always that this Company shall not be liable in any one casualty for more than the limit of liability as stated below for the location at which such casualty occurs:

#### Limits of Liability

In storage rooms, vaults and safes—\$20,000.00

Outside of storage rooms, vaults and safes—  
\$10,000.00

Locations—at 3926 Wilshire Blvd., Los Angeles, California

nor for more than \$5,000.00 while at any other location not used by the Assured for storage, nor for more than \$5,000.00 while in transit.

3. It is warranted by the Assured that an accurate record will be kept of all receipts issued showing the customer's name, address and description and stipulated amount on each article included

therein, which record shall be open for inspection by duly authorized representatives of this Company at all reasonable times during the policy period and for one year thereafter.

4. The Assured agrees to report to this Company not later than the fifteenth day of every month the total amount at risk hereunder on the last day of the preceding month and to pay premium thereon at the rates herein provided. A deposit premium of \$50.00 is due and payable on the date hereof and annually thereafter, and all monthly premiums shall be charged against this deposit premium until such time as it shall have been earned by this Company, after which time the additional monthly premium shall be due and payable on the date reports are made by the Assured as herein required.

5. The premium for this insurance shall be computed at the following monthly rate(s):

.0819¢ per \$100.00 of the amount at risk

6. Any loss, at the option of this Company, may be paid to the Assured, or adjusted with and paid to the Assured's customer or the owner of the property.

7. The Assured warrants that no certifications, certificates or policies of insurance covering the property insured hereunder will be issued by or through the Assured other than in this Company, as authorized under the terms of this policy when so endorsed.

8. This policy is deemed continuous, but it may be cancelled at any time by the Assured; or it may

be cancelled by the Company on fifteen (15) days' written notice thereof mailed to the Assured. If this policy shall be cancelled or become void or cease, the deposit premium having been paid, the balance of the deposit premium not yet earned shall be returned to the Assured.

Subject to all terms, conditions and warranties of the policy to which this rider is attached.

Attached to and forming part of Policy No. FC 1423 of the Franklin Fire Insurance Company, issued to B. R. Morris DBA Rifkin and Sons at its San Francisco, California Agency.

Date of Endorsement Sept. 14, 1939.

NEWHOUSE AND SAYRE, INC.

By: G. E. JOHNSTONE,

Agent. [8]

This Policy Is Made and Accepted Subject to the Foregoing Stipulations and Conditions and to the Conditions Printed on the Back Hereof, Which Are Hereby Specially Referred to and Made a Part of This Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive or be deemed to have waived any provision or condition of this policy unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the Assured unless so written or attached.

In Witness Whereof, this Company has executed and attested these presents, but this policy shall not be valid unless countersigned by a duly authorized Agent of the Company.

W. KURTH,

President.

H. O. SMITH,

Secretary.

Countersigned at San Francisco, Calif. this 14th day of September, 1939.

G. E. JOHNSTONE,

Agent. [9]

Newhouse and Sayre, Inc.

General Agents

Inland Marine—All Risks

116 John Street, New York, N. Y.

Insurance Exchange, Chicago, Illinois

417 Montgomery St., San Francisco, Cal.

548 S. Spring St., Los Angeles, Cal.

421 Walnut St., Philadelphia, Pa.

431 Leader Bldg., Cleveland, Ohio

### General Conditions

1. It is warranted by the Assured that this insurance shall in no wise inure directly or indirectly to the benefit of any carrier or other bailee.

2. If there is any other insurance covering the property insured hereunder, whether prior, subsequent to, or simultaneous with this insurance, which



in the absence of this insurance would cover the loss or damage hereby covered, then this Company shall not be liable hereunder for more than the excess over and above such other insurance. This clause, however, shall not apply to insurance effected by a customer or a member of the family of a customer of the Assured, and the existence of such insurance, or payment of a loss thereunder, shall not constitute a defense to any claim otherwise payable under this policy, nor shall such insurance be called on to contribute to any loss payable hereunder.

3. The Assured shall immediately report to this Company or its Agent every loss or damage which may become a claim under this policy, and also shall file with this Company or its Agent within ninety (90) days from date of loss, a detailed sworn proof of loss. Failure by the Assured to report the said loss or damage and to file such written proofs of loss as herein provided, shall invalidate any claim under this policy.

4. In case of loss or damage it shall be lawful and necessary for the Assured, his or their factors, servants and assigns, to sue, labor and travel for, in and about the defense, safeguard and recovery of the property insured hereunder, or any part thereof, without prejudice to this insurance; nor shall the acts of the Assured or this Company in recovering, saving and preserving the property insured in case of loss or damage, be considered a waiver or an acceptance of abandonment; to the charge whereof, this Company will contribute ac-

according to the rate and quantity of the sum herein insured.

5. The Assured shall submit, and so far as is within his or their power shall cause all other persons interested in the property and members of the household and employees to submit, to examinations under oath by any persons named by the Company, relative to any and all matters in connection with a claim, and shall produce for examination all books of account, bills, invoices, and other vouchers or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by the Company or its representatives, and shall permit extracts and copies thereof to be made.

6. All adjusted claims shall be paid or made good within thirty (30) days after presentation and acceptance of satisfactory proofs of interest and loss at the office of this Company. No loss shall be paid hereunder if the Assured has collected the same from others.

7. It is a condition of this policy that no suit, action or proceeding for the recovery of any claim under this policy shall be maintainable in any court unless the same be commenced within twelve (12) months next after the calendar date of the happening of the physical loss or damage out of which the said claim arose. Provided, however, that if by the laws of the state within which this policy is issued such limitation is invalid, then any such claim shall be void unless such action, suit or proceeding be

commenced within the shortest limit of time permitted, by the laws of such state, to be fixed herein.

Furriers' Customers Basic Policy

Expires—Continuous Until Cancelled

Name of Assured, B. R. Morris DBA Rifkin and Sons

Amount, \$20,000.00

Premium, \$50.00

No. FC 1423

The Franklin Fire Insurance Company of  
Philadelphia, Pennsylvania

The Green-Campbell Co.

Insurance

541 So. Spring St.

[Illegible]

Los Angeles, Cal.

It is important that the written portions of all policies covering the same property read exactly alike. If they do not, they should be made uniform at once. [10]

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State of California,  
County of Los Angeles—ss.

B. R. Morris being by me first duly sworn, deposes and says: That.....he is the Plaintiff in the foregoing and above entitled action; that.....he has.....read the foregoing Complaint (Insurance Policies) and knows the contents thereof; and that the same



is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that.....he believes it to be true.

B. R. MORRIS

Subscribed and Sworn to before me this 6th day of August, 1940.

[Notarial Seal]      CELIA L. FEINTECH,  
Notary Public in and for said County and State.  
My Commission Expires Oct. 17, 1943.

[Endorsed]: Filed Aug. 7, 1940. [11]

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[Title of District Court and Cause.]

ANSWER

Comes now the defendant, Franklin Fire Insurance Company of Philadelphia, Pennsylvania, and in answer to the plaintiff's complaint herein, admits, denies and alleges as follows:

I.

Denies each and every, all and singular, generally and specially, the allegations contained in Paragraph I.

II.

Denies each and every, all and singular, generally and specially, the allegations contained in Paragraph II.

## III.

Denies each and every, all and singular, generally and specially, the allegations contained in Paragraph V, except that defendant admits that plaintiff is a citizen of the State of California and that the defendant, Franklin Fire Insurance Company of Philadelphia, Pennsylvania is a citizen of the State of Pennsylvania. This answering defendant specifically denies that the amount in controversy is or exceeds, exclusive of interest and costs, the sum of \$3,000.00. [12]

## IV.

Admits that on the 14th day of September, 1939, this answering defendant executed and delivered to the plaintiff herein a policy of insurance a copy of which is attached to the plaintiff's complaint herein and marked as Exhibit "A" thereof, but denies that plaintiff paid to the defendant the sum of \$50.00 or any other sum or at all for premium in connection therewith, but to the contrary alleges that there was deposited with the defendant the sum of \$50.00 as premium deposit only; that on or about the 19th day of February, 1940, the entire amount of \$50.00 premium deposit was by this answering defendant returned to the plaintiff and accepted by the plaintiff; that this answering defendant has never received and has not received any premium payment whatsoever or at all in connection with the issuance of said policy; that, in addition thereto, said policy was on the 27 day of January, 1940, cancelled and

said policy ever since said date has been and is of no force or effect whatsoever or at all;

This answering defendant further denies that by the terms of said policy this answering defendant did insure the plaintiff or the defendants, or any of the defendants named herein, either from the 14th day of September, 1939, at noon, or from any other time or at all, until cancellation of said insurance, or for any other length of time, or at all, whether as in said policy provided or otherwise, against all or any loss or damage by fire, or otherwise, to an amount as in the policy provided, or in any other amount or amounts whatsoever or at all, as to the personal property or any other property of any kind or nature as described in said policy or otherwise. This defendant further denies that it was the intention of the plaintiff and/or this answering defendant that said policy of fire insurance was to cover customers' furs or any furs and/or garments, whether trimmed with fur or otherwise, whether in the possession of plaintiff or otherwise or at all, [13] except under and pursuant to the terms, covenants, conditions and provisions of said policy, Exhibit "A" attached to the plaintiff's complaint.

#### V.

In answer to Paragraph VII, denies each and every, all and singular, generally and specially, the allegations contained therein, and specifically in this connection alleges that this answering defendant issued and intended to issue only the policy of

insurance attached to plaintiff's complaint as Exhibit "A", and that said policy was the actual policy that this answering defendant intended to execute and issue, and that neither this answering defendant nor the plaintiff intended any other contract or policy of insurance subject to any different or other or lesser terms, covenants or conditions than as actually set forth in said contract, Exhibit "A" attached to plaintiff's complaint.

## VI.

Denies each and every, all and singular, generally and specially, the allegations contained in Paragraph VIII.

## VII.

In answer to Paragraph IX, this answering defendant denies that the plaintiff was not aware of the provisions and each of the provisions contained in said policy attached to plaintiff's complaint as Exhibit "A" thereof, and denies that said provisions and each of them were not called to the attention of plaintiff. Admits that no forms or receipts were furnished by this answering defendant to the plaintiff, but denies that it is customary or usual to furnish such forms under such policy where the terms are intended to be enforced as part of the policy or otherwise or at all; but, to the contrary, all forms and all receipts to be used by the plaintiff under and in connection with the terms, covenants, conditions and provisions of the policy, Exhibit "A" of plaintiff's complaint, were to have

been and should have been provided by the plaintiff [14] and not by this defendant.

Further answering said Paragraph IX, this answering defendant denies that the plaintiff, pursuant to the terms of the above policy, or otherwise, or at all, reported to this defendant not later than the fifteenth day of every month or at any other time or at all the total amount or any risk under said policy on the last day of the preceding month or any other time or at all, and in this connection alleges that there could have been no report of any amount at risk under said policy at any of the times in the complaint mentioned for the reason that at no time was any amount at risk.

Further answering said paragraph, this defendant alleges that while the plaintiff pretended to report certain amounts at risk for the months of September, October, November and December, actually said reports were false and untrue for the reason that the plaintiff had failed, neglected and refused at any time to comply with the terms, covenants, conditions and provisions of said policy, and that while the plaintiff had, under the terms of said policy, Exhibit "A", agreed to pay premiums as therein provided, that it had not agreed to pay any premiums under said policy up to date of cancellation, to-wit, January 27th, 1940, for the reason that no insurance had been effected thereunder. That it is not true that this defendant accepted said reports and/or charged any premiums for insurance on the items



reported, whether same is deemed to have been inclusive or exclusive of the items sued upon hereunder; that this answering defendant has at all times since the date of the issuance of said policy up to the date of its cancellation insisted upon a full and complete compliance with all the terms, covenants, conditions and provisions thereof, and has never in any wise or manner whatsoever waived or surrendered its rights to enforce compliance therewith and of each and every term, covenant, condition and provision thereof. [15]

#### VIII.

In answer to Paragraph X, alleges that this answering defendant has no information or belief upon the subject sufficient to enable it to answer the allegations therein contained, and placing *hits* denial on that ground, denies each and every, all and singular, generally and specially, the allegations therein contained.

#### IX.

In answer to Paragraph XI, denies each and every, all and singular, generally and specially, the allegations therein contained, save and except that this answering defendant admits that on or about the 22nd day of January, 1940, plaintiff herein gave to this answering defendant a purported sworn proof of loss, but denies that the same showed in detail or otherwise or at all the total or any loss and/or value of any personal property or other property covered by the policy sued upon herein,

Exhibit "A" to plaintiff's complaint and/or showing the amount payable to the plaintiff under said policy of \$6720.00 or any other sum or at all, save and except in this connection this answering defendant admits that said purported proof of loss set forth certain claimed items of personal property which were claimed to have been lost and destroyed in a fire, but which items this answering defendant alleges were not covered by policy of insurance referred to in Exhibit "A" of plaintiff's complaint; and specifically denies that said proof of loss was true or correct and specifically further denies that there was any loss sustained under or in connection with the policy referred to in plaintiff's complaint, Exhibit "A" thereof.

This answering defendant further denies that plaintiff has performed all or any of the conditions of said policy, Exhibit "A" of plaintiff's complaint on the plaintiff's part to be performed.

### X.

In answer to Paragraph XII, this answering defendant denies each and every, all and singular, generally and specially the [16] allegations therein contained, save and except that this answering defendant admits that said defendant has failed and refused, and still fails and refuses to pay the amount of \$6720 or any other sums or amounts whatsoever or at all, either to the plaintiff or to anyone whomsoever.

For a Further, Separate and Affirmative Defense to Plaintiff's Complaint, this answering defendant alleges that the complaint herein fails to state facts sufficient to constitute a cause of action or any cause of action herein.

For a Further, Separate and Second Affirmative Defense to plaintiff's complaint, this answering defendant alleges that no mutual mistake of fact ever existed between the plaintiff and this answering defendant; that the policy of insurance, copy of which is attached to plaintiff's complaint as Exhibit "A", in all respects and particulars conforms to the order for insurance made by the plaintiff to this answering defendant and pursuant to which said policy was issued; that said policy embodies the only agreement this defendant ever intended to execute; that plaintiff at all times knew the terms, covenants, conditions and provisions of said contract, Exhibit "A" hereof, exactly as set forth in said Exhibit "A" of plaintiff's complaint; that if any mistake occurred, same was not mutual but was unilateral on the plaintiff's part alone, and such mistake, if any, was at all times unknown to this defendant.

And for a Further, Separate and Third Affirmative Defense, to plaintiff's complaint, this answering defendant alleges that since the date of issuance of said policy, to-wit, September 14, 1939, said policy has been in the possession of the plaintiff; that at all times since the issuance thereof said policy has been exactly as photostatically shown in Exhibit



“A” of plaintiff’s complaint, and the plaintiff knew at all times from the date of issuance thereof [17] the terms, covenants, conditions and provisions thereof; that, notwithstanding, the plaintiff has at no time notified this answering defendant of any alleged variance between the alleged intention of the plaintiff and the plain and express terms, covenants conditions and provisions of said policy; that at no time until the filing of the complaint herein did the plaintiff advise this answering defendant that said policy was allegedly not in conformity with the intention of the plaintiff; that such failure to notify this answering defendant of said alleged failure to said policy to express the intention of the plaintiff, if in fact it did fail to so do, constitutes laches on the part of the plaintiff, whereby plaintiff is estopped from asserting that he did not know the contents of said policy and that the same did not embody the alleged intended agreement of the plaintiff or the parties.

And for a Further, Separate and Fourth Affirmative Defense to plaintiff’s complaint, this answering defendant alleges that at all times since the execution of said policy, to-wit, on the 14th day of September, 1939, the plaintiff herein has been in possession thereof, all as photostatically set forth in Exhibit “A” of plaintiff’s complaint; that but a casual inspection of said policy at any time from the date of the issuance thereof would have informed plaintiff of the terms, covenants, conditions and provisions thereof, and that same did not, if it

be a fact that it did not, express the intention of the plaintiff; that this answering defendant was never at any time aware of any other or different intention of the plaintiff than as expressed in said contract Exhibit "A" of plaintiff's complaint; that if the plaintiff did not know of the terms, covenants, provisions and conditions of said policy, such failure on his part was due to his own negligence and failure to exercise reasonable care and diligence, or any care and diligence in reading said contract or in detecting the existence of his own [18] alleged error; that such negligence on the part of the plaintiff constitutes laches and plaintiff is estopped from asserting his ignorance of the contents of said policy, Exhibit "A" of the complaint herein, and from denying that said policy embodies the true agreement of the parties.

And for a Further, Separate and Fifth Affirmative Defense to plaintiff's complaint, this answering defendant alleges that prior to the commencement of the action herein said policy was cancelled according to the terms and conditions thereof and all premium deposits returned to the plaintiff by this answering defendant, and the plaintiff accepted said return of premium deposit; that said policy was never placed in effect so far as causing any insurance risk to be attached, and the plaintiff, by accepting the return of said premium deposit in full and paying no premiums at all to the defendant in connection with said policy, acquiesced in the said fact and is estopped to assert any claim thereunder.

And for a Further, Separate and Sixth Affirmative Defense to plaintiff's complaint, this answering defendant alleges that on the 27th day of January, 1940, said policy according to its terms and conditions, was cancelled and rescinded by the plaintiff, and ever since said date said policy has been of no force or effect whatsoever or at all; that, by virtue thereof, and by virtue of the fact that no action was instituted herein by the plaintiff or by any of the alleged beneficiaries thereunder, plaintiff and any and all alleged beneficiaries thereunder have no right, claim, interest or demand of any kind under said policy; that, therefore, irrespective of any other claims of the plaintiff hereunder, any decision in this cause would constitute an adjudication of a moot controversy.

And for a Further, Separate and Seventh Affirmative Defense, to plaintiff's complaint, this answering defendant alleges that the [19] present action is not maintained in the names of the true parties in interest; that the plaintiff, as such, has no right, demand or interest under said policy, Exhibit "A" to plaintiff's complaint; that the alleged beneficiaries, if any, have not made any demand or instituted any action in connection with any asserted or alleged rights thereunder; that, moreover, on the face of the complaint it appears that all of the alleged beneficiaries under said policy, even assuming there were any beneficiaries thereunder, or that there was a valid policy in effect, are not made parties to the proceedings herein.

And for a Further, Separate and Eighth Affirmative Defense to plaintiff's complaint, this answering defendant alleges that the plaintiff herein at all times herein mentioned has failed, neglected and refused, and still fails, neglects and refuses to register or file with the Clerk of the County of Los Angeles, State of California, in which the principal place of business of plaintiff is and was at all times herein mentioned located, a certificate stating the name in full and the place of residence of such person operating a business under a fictitious firm name or style, and has failed, neglected and refused to publish such certificate in the manner provided by the law of the State of California; that in this connection plaintiff has and did at all times herein mentioned fail, neglect and refuse to comply with the provisions of sections 2466 and 2468 of the Civil Code of the State of California whereby and by reason whereof plaintiff is not entitled to maintain this action or any action herein.

Wherefore, this answering defendant prays that the plaintiff's prayer for relief hereunder be denied; that the plaintiff take nothing by his complaint herein; and that this defendant be awarded judgment for costs of suit herein.

JOSEPH F. RANK,

Attorney for defendant, Franklin Fire Ins. Co. [20]

State of California,  
County of Los Angeles—ss.

Joseph F. Rank being by me first duly sworn, deposes and says: that he is the attorney of The Franklin Fire Ins. Co. of Philadelphia, Pennsylvania, one of the defendants in the above entitled action; that he has read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true. That he makes this verification for and in behalf of said corporation; that there is no officer of said defendant corporation present within the County of Los Angeles, where affiant has his office and for that reason affiant makes this verification.

JOSEPH F. RANK

Subscribed and sworn to before me this 10th day of Sept. 1940.

[Seal] ELIZABETH G. STOREY,  
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires March 15th, 1944.

[Endorsed]: Filed Sep. 10, 1940. [21]



[Title of District Court and Cause.]

NOTICE OF MOTION FOR CONTINUANCE

To the Defendant The Franklin Fire Insurance  
Company of Philadelphia, Pennsylvania, and  
to Joseph A. Rank, Its Attorney:

You and each of you will please take notice that on Monday, March 31, 1941, at the hour of 10:00 o'clock A. M. before the Honorable J. F. T. O'Connor, in the Federal Building, Los Angeles, California, the plaintiff in the above entitled action will move the Court to vacate the former order of the Court setting the above matter for trial on April 25, 1941, and to either order said matter off calendar or to continue the trial of said matter to some period of time after April 25, 1941. Said motion will be based upon the pleadings, records and files of the within action and upon the affidavit of Edward K. Zuckerman accompanying this notice.

ZUCKERMAN AND STEIN

By EDWARD K. ZUCKERMAN

EDWARD K. ZUCKERMAN

[Endorsed]: Filed Mar. 26, 1941. [22]

[Title of District Court and Cause.]

AFFIDAVIT OF EDWARD K. ZUCKERMAN  
IN SUPPORT OF MOTION FOR  
CONTINUANCE

State of California,  
County of Los Angeles—ss.

Edward K. Zuckerman, being first duly sworn on oath deposes and says: That he is one of the attorneys for the plaintiff in the above entitled action and is the attorney who prepared the pleadings in the above action and is most familiar with the facts of plaintiff's case; that the trial in the above action is now set for April 25, 1941, and affiant believes the trial of the above matter should be continued to some later future date or be placed off calendar entirely, to be reset for hearing some time in the future, for the following reasons:

The nature of plaintiff's action is to recover on an insurance policy for fire damage and loss to merchandise of customers in a place of business conducted by plaintiff. That the said policy of insurance contains a one year period of limitation to sue thereon. The policy covers "loss of or damage to the insured property, including the assured's legal liability therefor". The within action was filed within the necessary one year period. However said one year period has since expired. Plaintiff named numerous fictitious defendants in the within action with the [23] thought that the customers who suffered the actual fire loss would join in this action

and set forth their loss in an effort to recover the same from the defendant herein. However to date none of said customers have done so. Plaintiff believes that he is unable to serve said customers as defendants so as to force them to state their position in this action, since to do so would be to create party defendants who are citizens of the same state as plaintiff, thereby defeating the jurisdiction of the Federal Court and barring plaintiff from any future recovery by reason of the one year period of limitations set forth in said insurance policy; that plaintiff has no way of knowing what his legal liability is under said policy until he has determined the same with said customers. Affiant believes that within the next several months said customers will ask leave to intervene as parties plaintiff in the within action, and that in such manner the rights of all parties concerned may be determined by the within action. However, affiant believes that plaintiff, having been required to file the within action within a one year period, due to the limitation period contained in defendant's policy, should not be required by defendant to proceed to trial before plaintiff can properly ascertain plaintiff's actual loss and legal liability so as to properly introduce into evidence plaintiff's claims against defendant.

Affiant at the present time is engaged in the above court in the trial of an action entitled Joseph I. Siegel, etc. v. J. W. Oakley, Case No. 371-B, which said cause is set for trial on March 25, 1941., Affiant, together with other counsel, has been devoting prac-



tically his exclusive time to the preparation of said case for the past several months. This trial date was originally set for March 21, 1941. However, the trial court, on its own motion continued the date to March 25, 1941, and also informed counsel that the case could not be tried continuously but would [24] have to be interrupted on several occasions for periods of a few days to a week. Hence affiant avers that the trial of said action may extend well beyond a period of two months. This trial date will either overlap or come so close to the date set for trial in the within action that affiant will be unable to spend any time preparing for the trial of the within action. That in addition to the reasons above set forth affiant believes that in any event the trial of the within action should be continued for a period of several months so as to allow affiant to properly prepare for the trial of the within action.

In addition, it should be noted that defendants' Seventh affirmative defense, as pleaded in defendants' answer, alleges that the present action is not maintained in the names of the true party in interest, and the beneficiaries under the policy, if any, are not made parties to the proceedings herein. As set forth in the earlier part of this affidavit, the possibility that such a defense might be good at the present time as a plea in abatement places plaintiff in a position where it is necessary in justice and in equity to continue the trial of the present action until such time as plaintiff's legal liability can be

ascertained, or until the proper parties intervene in the present action.

Wherefore affiant prays that the trial date of April 25, 1941, heretofore set by the above Court be vacated and that said matter be placed off calendar, or, that in the alternative, said date of trial be continued for at least a period of several months.

EDWARD K. ZUCKERMAN

Subscribed and Sworn to before me this 25th day of March, 1941.

[Seal]

CELIA L. FEINTECH,

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Oct. 17, 1943.

[Endorsed]: Filed Mar. 26, 1941. [25]

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[Title of District Court and Cause.]

NOTICE OF MOTION FOR DISMISSAL

To the Plaintiff above named, and to his attorneys,  
Messrs. Zuckerman & Stein:

You and Each of You Will Please Take Notice that on Monday, September 22nd, 1941, at the hour of 10 o'clock A. M., of that day, or as soon thereafter as counsel can be heard, in the Federal Court House and Post Office Building, before the Honorable Leon R. Yankwich, Judge Presiding, the defendant herein, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, will move the

above entitled Court for its order dismissing with prejudice the action herein.

Said motion will be made on the grounds that it appears from the complaint herein and the other papers and documents on file, particularly from the affidavit of Edward K. Zuckerman in support of motion for continuance, which affidavit is dated March 25th, 1941, that there is no diversity of citizenship between the plaintiff and the defendants, and hence that this Honorable Court is without jurisdiction.

Said motion will be based upon this notice of motion, [29] upon the affidavit of Joseph F. Rank filed herewith, and upon all papers and records on file herein, particular attention being called to the affidavit of Edward K. Zuckerman filed in support of motion for continuance herein and dated March 25th, 1941.

Dated: September 10th, 1941.

JOSEPH F. RANK,  
Attorney for Defendant The Franklin Fire Insurance Company of Philadelphia, Pennsylvania.

[Endorsed]: Filed Sep. 12, 1941. [30]

[Title of District Court and Cause.]

AFFIDAVIT OF JOSEPH F. RANK IN  
SUPPORT OF MOTION FOR  
DISMISSAL

State of California,  
County of Los Angeles—ss.

Joseph F. Rank, being first duly sworn, deposes and says: That he is the attorney for The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, one of the defendants herein.

Affiant is informed and believes and therefore alleges that the named defendants, other than The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, are residents of the State of California, the alleged residence of plaintiff, in fact said named defendants all being purported customers of the plaintiff. That in this respect no allegation is made in the complaint to the effect that the defendants named, other than The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, are citizens of any state other than the State of California.

That as a matter of fact, a sworn proof of loss was rendered to the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, by B. R. Morris, plaintiff herein, on January 25, 1940, in which the address of the defendant, John Castalet, was listed as 1043 South Mansfield Avenue, Los Angeles, [31] California, and in which the address of defendant Jane Van Deusen was listed as

3499 Sawtelle Avenue, Los Angeles, California, and the address of defendant P. C. Gernet was listed as 618 North Alt Drive, Beverly Hills, California, and in which the address of Mrs. Slate (apparently defendant Jane Slate) was listed as in care of Bardin's Sportswear, 714 South Los Angeles Street, Los Angeles, and in which the address of Elenore Staples (apparently defendant Elenore Staples Boehner) was listed as 622 South Hobart Street, Los Angeles, California, and in which the address of Mrs. Sheldon Hymer (apparently defendant Sheldon W. Hymer) was listed as 1436 Beverly Glen Drive, Beverly Hills, California.

That in addition thereto the attorney for the plaintiff herein did on the 25th day of March, 1941, make an affidavit in support of motion for continuance, which is on file in the cause herein, in which affidavit said Edward K. Zuckerman states that the various defendants herein are customers of the plaintiff who may claim loss, and that they were in fact contemplating to be joined as defendants in order that they might state their position in the case, and that they are citizens of the State of California, and that hence, he has now realized that he cannot serve them as to do so would defeat the jurisdiction of this Honorable Court.

Therefore, affiant represents and shows that there is no diversity of citizenship between the plaintiff and all the defendants, and hence there is no jurisdiction of this Honorable Court.

JOSEPH F. RANK



Subscribed and Sworn to before me this 10th day of September, 1941.

[Seal]

ETHEL HICKEY,

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Sep. 12, 1941. [32]

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At a stated term, to wit: The September Term, A. D. 1941, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 22nd day of September in the year of our Lord one thousand nine hundred and forty-one.

Present:

The Honorable: Leon R. Yankwich, District Judge.

No. 1099-Y Civil

B. R. MORRIS, doing business as L. RIFKIN & SONS,

Plaintiff,

vs.

THE FRANKLIN FIRE INSURANCE CO. OF  
PHILADELPHIA, PENNSYLVANIA,  
Defendant.

This cause coming on for hearing motion of defendant The Franklin Fire Insurance Company of



Philadelphia, Pennsylvania, for an order dismissing the action with prejudice; Edw K. Zuckerman, Esq., appearing as counsel for the plaintiff; Joseph F. Rank, Esq., appearing as counsel for the defendant:

Attorney Rank presents the said motion and Attorney Zuckerman moves to file amended complaint, which is denied. The motion of defendant Franklin Fire Insurance Co., etc., is granted on the grounds of no diversity of citizenship. [33]

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In the District Court of the United States  
Southern District of California'

Central Division

No. 1099-Y Civil

B. R. MORRIS, doing business as L. RIFKIN &  
SONS,

Plaintiff,

vs.

THE FRANKLIN FIRE INSURANCE COM-  
PANY OF PHILADELPHIA, PENNSYL-  
VANIA, JANE COLLETI, JOHN CASTA-  
LET, JANE VAN DEUSEN, P. C. GERNET,  
T. GROSSMAN, SHELDEN W. HYMER,  
JANE SLATE, ELENORE STAPLES  
BOEHNER, Et Al.,

Defendants.

### ORDER OF DISMISSAL

Be It Remembered, that the motion of the de-  
fendant, The Franklin Fire Insurance Company of

Philadelphia, Pennsylvania, for dismissal of the action herein, came on regularly to be heard in the Courtroom of the Honorable Leon R. Yankwich, Judge Presiding, in the United States Post Office and Court House Building, Los Angeles, California, on the 22nd day of September, 1941, the plaintiff being represented by his counsel, Messrs. Zucker-  
man & Stein, by Arthur E. Stein, and defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, being represented by its attorney, Joseph F. Rank, and due notice thereof having been given, said motion for dismissal was duly considered by the Court, and it appearing to the Court that this Court lacked jurisdiction of said action, said motion was by the Court granted.

Pursuant thereto, It Is Hereby Ordered, Adjudged and Decreed that judgment of dismissal be entered in the cause herein, and that the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, have and recover of the plaintiff its costs of suit incurred herein, taxed in the sum of \$11.00.

Done in Open Court this 24th day of September, 1941.

LEON R. YANKWICH,  
Judge.

[Endorsed]: Filed Sep. 24, 1941. Judgment entered Sep. 24, 1941. Docketed Sep. 24, 1941. Book 6, Page 634. [34]

[Title of District Court and Cause.]

NOTICE OF MOTION TO VACATE ORDER OF  
DISMISSAL, FOR LEAVE TO FILE AN  
AMENDED COMPLAINT AND FOR  
LEAVE TO RE-ALIGN PARTIES DE-  
FENDANT AS PARTIES PLAINTIFF OR,  
IN THE ALTERNATIVE, TO DISMISS AS  
TO CERTAIN DEFENDANTS.

To the Defendant, The Franklin Fire Insurance  
Company of Philadelphia, Pennsylvania, and to  
Joseph F. Rank, Its Attorney:

You, and Each of You, Will Please Take Notice  
that on Monday, the 3rd day of November, 1941,  
at the hour of 10:00 o'clock A. M. in the Court  
Room of the Honorable Leon R. Yankwich in the  
Federal Building, Los Angeles, California, or as  
soon thereafter as counsel can be heard, plaintiff  
herein will move the court as follows:

(a) To vacate and set aside the order of dis-  
missal of this action heretofore made by this Court  
on the 22nd day of September, 1941:

(b) To allow plaintiff to file an amended com-  
plaint, a copy of which proposed amended com-  
plaint is served and filed herewith;

(c) To allow plaintiff to dismiss from the within  
action all defendants other than the defendant, The  
Franklin Fire Insurance Company of Philadelphia,  
Pennsylvania, or, in the alternative, for an order  
of the Court re-aligning said defendants, other than  
the defendant, The Franklin Fire Insurance Com-

pany of Philadelphia, Pennsylvania, as parties plaintiff in this action in place and in [35] stead of their present status as parties defendant.

Said motion will be based upon the records, files and pleadings of the within action, upon this notice, upon the affidavit of Arthur Edmund Stein accompanying this notice, and upon the proposed amended complaint accompanying this notice.

Said motion will be based upon the grounds that all defendants, with the exception of the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, are not indispensable or necessary parties to this action; that a new trial or hearing of this motion should be granted plaintiff upon the ground that said order of dismissal was taken against plaintiff through surprise, mistake and excusable neglect; and upon the grounds and reasons disclosed in the records, files, pleadings and documents on file in the above cause and filed herewith.

ZUCKERMAN AND STEIN  
By ARTHUR EDMUND STEIN

[Endorsed]: Filed Oct. 23, 1941. [36]

[Title of District Court and Cause.]

AFFIDAVIT OF ARTHUR EDMUND STEIN  
IN SUPPORT OF MOTION TO VACATE  
ORDER OF DISMISSAL FOR LEAVE TO  
FILE AN AMENDED COMPLAINT AND  
FOR LEAVE TO RE-ALIGN PARTIES  
DEFENDANT AS PARTIES PLAINTIFF  
OR, IN THE ALTERNATIVE, TO DISMISS  
AS TO CERTAIN DEFENDANTS.

State of California,  
County of Los Angeles—ss.

Arthur Edmund Stein, being first duly sworn,  
deposes and says:

That he is one of the attorneys for the plaintiff herein; that the original complaint on file herein names as defendants the Franklin Fire Insurance Company of Philadelphia, Pennsylvania, and numerous other parties by name and some by fictitious names. It is alleged in said complaint that the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, issued its policy, a copy of which is attached to and made a part of said complaint, whereunder said defendant insured plaintiff and all defendants except said defendant insurance company. It is further disclosed in said complaint that plaintiff was holding the personal property destroyed by fire as bailee, and it is stated that all defendants except the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, are joined as parties defendant since

the insurance was for the benefit of said defendant and this lawsuit was brought on behalf of said defendants. [38]

It has at all times since the filing of the within action been the intention of plaintiff herein to recover for the loss of the personal property described in said complaint and to hold said sums recovered for the benefit of and to pay the same to the individual parties who placed the same in the hands of plaintiff as bailee. This intention is disclosed in the complaint and in the affidavit of Edward K. Zuckerman on file herein in support of a motion for continuance.

Further, the policy of insurance itself, which is a part of said complaint, states that the Franklin Fire Insurance Company of Philadelphia, Pennsylvania, insures "B. R. Morris dba Rifkin & Sons, hereinafter called the assured;" the policy does not state that any other parties are insured. The answer of the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, on file herein, admits the execution and delivery to plaintiff of said policy.

Hence, it is submitted that the pleadings and all documents on file clearly show, and have at all times herein shown, that the plaintiff and the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, are the only necessary parties to the present action and that the remaining defendants should properly either be dismissed or re-aligned as parties plaintiff.



A motion for dismissal of the within action on the grounds of lack of jurisdiction was heretofore made and heard before this Court on the 22nd day of September, 1941. An affidavit of Joseph F. Rank, filed in support of said motion, was not controverted by plaintiff and no counter-affidavits were filed since affiant believed that the facts therein alleged were correct and that the conclusions therein alleged, while incorrect, were mere conclusions and not binding. Further, affiant intended to and did move in open Court at the time of the hearing of said motion for [39] leave to dismiss all defendants except the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, from the within action and for leave to file an amended complaint, which was at that time presented to the Court and which is the same as that now proposed in the present motion. Said motions of plaintiff were denied and motion of defendant to dismiss was granted. Affiant believes that by surprise, mistake and excusable neglect plaintiff was thus prevented from furnishing to the Court additional proof that the defendants herein, other than the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, are not necessary parties to the action and should have been and should be dismissed or re-aligned as parties plaintiff.

ARTHUR EDMUND STEIN

Subscribed and sworn to before me this 22nd day of October, 1941.

[Seal] E. K. ZUCKERMAN,  
Notary Public, in and for the County of Los Angeles, State of California.

My Commission Expires June 20, 1945.

[Endorsed]: Filed Oct. 23, 1941. [40]

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[Title of District Court and Cause.]

AFFIDAVIT OF JOSEPH F. RANK IN RESPONSE TO AFFIDAVIT OF ARTHUR EDMUND STEIN IN SUPPORT OF MOTION TO VACATE ORDER OF DISMISSAL, ETC.

State of California,  
County of Los Angeles—ss.

Joseph F. Rank, being first duly sworn, deposes and says:

That he is attorney for defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, herein; that the motion of plaintiff herein to vacate the order of dismissal insofar as it seeks leave to file an amended complaint and re-align the parties, and to dismiss as to certain defendants, is identically the same as the motion made in open Court by the plaintiff at the time of the granting of the motion to dismiss herein, to wit, on the 22nd day of September, 1941; that no legal showing is

made entitling the plaintiff to renew said motion; that the complaint herein as appears from the complaint [41] itself is an action to recover judgment in behalf of plaintiff and defendant owners as their rights may be established and is, in so many words, designed to recover for all parties beneficiary under the contract of insurance; that it is not a trust action nor an action for the benefit of third party beneficiaries under said contract of insurance.

That moreover, as alleged in said complaint, the policy while it insures B. R. Morris, the plaintiff, called the assured in the policy, also as alleged in the complaint, insures the various defendants as their interests may appear and as such is a third party beneficiary contract, and in fact, specifically so provides, and provides further that the insurance company may at its own option pay either to the assured or to the customers (third party beneficiaries) as, when and if liability accrues under said policy.

That while it is true that this Honorable Court may makes its order to re-align the parties, to do so would avail plaintiff nothing in this action, for if such were done, the Court would be without **jurisdiction for the reason** that the individual claims of the various beneficiaries would be less than the jurisdictional requirements, to wit, \$3,000.00.

It is respectfully submitted that the motion of plaintiff herein be denied.

JOSEPH F. RANK

Subscribed and Sworn to before me this 1st day  
of November, 1941.

[Seal]

ETHEL HICKEY.

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Nov. 3, 1941. [42]

[Title of District Court and Cause.]

(Proposed)

## FIRST AMENDED COMPLAINT

(Insurance Policies)

Comes now the plaintiff and for cause of action against the defendant complains and alleges, as follows, to-wit:

I.

That at all times herein mentioned, the plaintiff, B. R. Morris, was and now is doing business under the fictitious firm name and style of L. Rifkin & Sons, with his principal place of business located in the City of Los Angeles, County of Los Angeles, State of California.

## II.

That prior to the commencement of this action, plaintiff complied with Section 2466 of the Civil Code of the State of California, by filing a certificate with the County Clerk of Los Angeles County, State of California, together with an affidavit showing publication of such certificate, all as required by said section. [43]

## III.

That at all times herein mentioned the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania, duly authorized and licensed to transact fire insurance business in the State of California and maintains an office in the County of Los Angeles, State of California.

## IV.

That plaintiff is a citizen of the State of California, and the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, is a citizen of the State of Pennsylvania; that the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand and no/100ths (\$3,000.00) Dollars.

## V.

That on the 14th day of September, 1939, the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, in consideration of the sum of Fifty and no/100ths (\$50.00) Dollars and premiums thereafter to be paid, executed and delivered to plaintiff its policy of insurance in writing known as Furriers' Customers Basic Policy in a provisional amount to the extent of Twenty Thousand and no/100ths (\$20,000.00) Dollars for merchandise located in storage rooms, vaults and safes and to the extent of Ten Thousand and no/100ths (\$10,000.00) Dollars for merchandise located out-



side of storage rooms, vaults and safes. Said policy bore No. FC-1423, and a copy of said policy is hereto attached and marked Exhibit "A" and hereby made a part of this complaint. That by the terms of said policy said defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, did insure said plaintiff from the 14th day of September, 1939, at noon, until cancellation of said insurance as in said policy provided, [44] as to the personal property described in said policy. That it was the intention of plaintiff and defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, that said policy of fire insurance was to cover customers' furs and garments trimmed with fur in the possession of plaintiff.

## VI.

That through the mistake of plaintiff, which mistake the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, at that time knew or suspected, said policy of insurance did not truly express the intention of the parties in that said policy of insurance covered only customers' furs and garments trimmed with fur that were accepted from customers by the assured for storage, alteration, repairing, cleaning or remodeling, and for which the assured issued a receipt under which the assured agreed to effect insurance on such property; that it was the intention of plaintiff, which intention the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, at that time knew or suspected, not to limit



said insurance policy to such furs and garments for which the assured issued a receipt and under which the assured agreed to effect insurance on the property and not to limit the liability of said company under said policy to the amount stipulated in the assured's receipt as applying to each respective article, whether on account of the assured's legal liability or otherwise.

## VII.

That said policy should be revised so as to express the intentions of the parties by excluding from the policy the following provisions, to-wit:

“This policy only covers Furs, or garments trimmed with Fur, being the property of customers, accepted by the Assured for storage, alteration, repairing, cleaning [45] or remodeling, and for which the Assured issues a receipt under which the Assured agrees to effect insurance on the property.

“This Company shall not be liable hereunder for more than the amount stipulated in the Assured's receipt as applying to each respective article, whether on account of the Assured's legal liability or otherwise.”

and in lieu of the above provisions insert the following provisions, to-wit:

“This policy only covers Furs, or garments trimmed with Fur, being the property of customers in the possession of plaintiff.”

## VIII.

That plaintiff was not aware of the above provisions being in said policy and said provisions were not called to the attention of plaintiff. No proper forms or receipts were furnished to plaintiff by the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, although it is customary to furnish such forms under such a policy where the above terms are intended to be enforced as a part of the policy. That plaintiff pursuant to the terms of the above policy reported to the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, not later than the fifteenth day of every month the total amount at risk under said policy on the last day of the preceding month; that the amount so reported at risk included the items herein sued on and plaintiff agreed to pay premiums thereon at the rates in the policy provided; that said defendants, The Franklin Fire Insurance Company [46] of Philadelphia, Pennsylvania, accepted said reports and charged a premium for insurance on the items reported including the items sued hereunder. That by reason thereof plaintiff waived the above provisions in said policy and is estopped to rely thereon.

## IX.

That on or about the 30th day of November, 1939, said property was greatly damaged by fire and a large part destroyed by fire. That plaintiff is informed and believes and therefore alleges that said personal property so destroyed was of the value

of Six Thousand Seven Hundred and Twenty (\$6,720.00) Dollars; that at the time of the loss said property belonged to customers of plaintiff and consisted of furs which had been accepted by plaintiff for storage, alteration, repairing, cleaning and remodeling, and was in the possession of plaintiff at 3926 Wilshire Boulevard, Los Angeles, California.

X.

That the loss and damage by reason of said destruction and damage was Six Thousand Seven Hundred and Twenty (\$6,720.00) Dollars; that plaintiff immediately gave written notice of said fire and of said loss to the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania; that on or about the 22nd day of January, 1940, and within sixty (60) days from the date of said loss, the insured rendered to the defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, at its main office in California a sworn proof of loss showing in detail the total loss and value of the personal property covered by said policy of The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, and showing the amount payable to said plaintiff under said policy of Six Thousand Seven Hundred and Twenty (\$6,720.00) Dollars; that plaintiff has performed all the conditions of said policy on his part to be performed. [47]

XI.

That thirty (30) days after receipt of said proof of loss above set forth, to-wit, on the 22nd day of February, 1940, under the terms of said policy,

there became due and payable from said defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, to plaintiff the sum of Six Thousand Seven Hundred and Twenty (\$6,720.00) Dollars, together with interest thereon at the rate of seven (7%) per cent per annum from April 22, 1940, on account of and under said policy of insurance and that said defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, has refused and failed to pay said amount and has not paid any part of said loss to plaintiff.

Wherefore: Plaintiff prays judgment as follows:

1. That said policy of fire insurance be amended as above provided.

2. That plaintiff be given judgments against defendant, The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, in the sum of Six Thousand Seven Hundred and Twenty (\$6,720.00) Dollars, together with interest thereon at the rate of seven (7%) per cent per annum from April 22, 1940.

3. For his costs of suit and for such other and further relief as to the court seems just and proper in the premises.

ZUCKERMAN AND STEIN  
By ARTHUR EDMUND STEIN  
Attorneys for Plaintiff  
ARTHUR EDMUND STEIN

[Clerk's Note: Exhibit "A" attached hereto is omitted as it is identical with Exhibit "A" to the Complaint, set forth at page 10 of this printed record.] [48]

State of California,  
County of Los Angeles—ss.

B. R. Morris, being by me first duly sworn, deposes and says: That he is the Plaintiff in the foregoing and above entitled action; that he has read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

B. R. MORRIS

Subscribed and sworn to before me this 20th day of September, 1941.

(Notarial Seal) E. K. ZUCKERMAN

Notary Public in and for said County and State.  
My Commission expires June 20, 1945.

[Endorsed]: Lodged Oct. 23, 1941. [52]

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At a stated term, to wit: The September Term, A. D. 1941, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 3rd day of November in the year of our Lord one thousand nine hundred and forty-one.

Present: The Honorable Leon R. Yankwich,  
District Judge.



No. 1099-Y Civil

B. R. MORRIS, doing business as L. RIFKIN &  
SONS,

Plaintiff,

vs.

THE FRANKLIN FIRE INSURANCE CO. OF  
PHILADELPHIA, PENN., et al.,  
Defendants.

This cause coming on for hearing motion of plaintiff to: (a) set aside order of dismissal of September 22, 1941, (b) to allow plaintiff to file an amended complaint, (c) to allow plaintiff to dismiss from within action all defendants other than defendant The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, or in the alternative for an order re-aligning said defendants, other than the Franklin Fire Insurance Company of Philadelphia, Pennsylvania, as parties plaintiff, in this action in the place and instead of their present status as parties defendant; Joseph F. Rank, Esq., appearing as counsel for the defendant; A. E. Stein, Esq., appearing as counsel for the plaintiff:

Samuel Barchas, Esq. makes a statement and suggests that his motion, now set for a later date, and the above motion be heard at the same time.

Attorney Stein makes a statement and presents motion. Attorney Rank, in behalf of defendant, replies to Attorney Stein's motion, and Attorney Stein argues in rebuttal. The said motion is denied.  
MBk 23/316. [53]



[Title of District Court and Cause.]

NOTICE OF APPEAL TO  
CIRCUIT COURT OF APPEALS

Notice Is Hereby Given that the plaintiff above named hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Order of the Court made October 22, 1941, entered in Civil Order Book 6, page 634, wherein the Court entered a Judgment of Dismissal against plaintiff, and from the Order of the Court made November 3, 1941, wherein the Court denied plaintiff's Motion to Vacate Order of Dismissal, for Leave to File an Amended Complaint and for Leave to Re-align Parties Defendant as Parties Plaintiff or, in the Alternative, to Dismiss as to Certain Defendants.

ZUCKERMAN AND STEIN,

By ARTHUR EDMUND STEIN,

ARTHUR EDMUND STEIN,

Attorneys for Plaintiff and  
Appellant.

[Endorsed]: Mailed copies to Atty. for Deft., Joseph F. Rank, Esq., & to Samuel I. Barchas, in pro. per. E. L. S. 11/14/41. Filed Nov. 14, 1941.

[54]

[Title of District Court and Cause.]

### CLERK'S CERTIFICATE

I, R. S. Zimmerman, Clerk of the District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 61 inclusive contain full, true and correct copies of Complaint; Answer of Defendant The Franklin Fire Insurance Company of Philadelphia; Plaintiff's Notice of Motion for Continuance; Affidavit of Edward K. Zuckerman; Order Transferring Case to Judge O'Connor; Stipulation and Order Continuing Trial; Notice of Trial; Notice of Motion for Dismissal; Affidavit of Joseph F. Rank; Order Denying Motion of Plaintiff for Leave to File Amended Complaint and Granting Defendant's Motion to Dismiss; Order of Dismissal; Notice of Motion to Vacate Order; Affidavit of Arthur Edmund Stein; Affidavit of Joseph F. Rank; Proposed First Amended Complaint; Order Denying Motion to Vacate Order; Notice of Appeal; Cost Bond on Appeal; Designation by Appellant of Record on Appeal; Designation by Appellee of Additional Portions of Record on Appeal; and Order Extending Time to Docket Appeal, which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the fees of the Clerk for comparing, correcting and certifying the foregoing record amount to \$10.40, which amount has been paid to me by the Appellant.

Witness My Hand and the seal of the said District Court, this 14th day of January, A. D. 1942.

(Seal) R. S. ZIMMERMAN,

Clerk.

By EDMUND L. SMITH,

Deputy.

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[Endorsed]: No. 10024. United States Circuit Court of Appeals for the Ninth Circuit. B. R. Morris, doing business as L. Rifkin & Sons, Appellant, vs. The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed January 15, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 10024

B. R. MORRIS, doing business as L. RIFKIN  
& SONS,

Plaintiff and Appellant,

vs.

THE FRANKLIN FIRE INSURANCE COM-  
PANY OF PHILADELPHIA, PENNSYL-  
VANIA,

Defendant and Appellee.

STATEMENT OF POINTS AND DESIGNA-  
TION OF THE PARTS OF THE RECORD  
NECESSARY FOR THE CONSIDERATION  
THEREOF.

Comes now the appellant and designates the fol-  
lowing points that he will rely upon on appeal:

Point 1: The Court erred in finding that it lacked  
jurisdiction of the action and in ordering a dismissal  
of the action.

Point 2: The Court erred in denying appellant's  
Motion to Vacate the Order of Dismissal.

Point 3: The Court erred in refusing to grant  
plaintiff leave to file an Amended Complaint.

Point 4: The Court erred in refusing to realign  
parties defendant as parties plaintiff or, in the  
alternative, to dismiss as to certain defendants.

Pursuant to the rules of Practice of this Court, the appellant does hereby designate the following parts of the record as those to be contained in the record on appeal in the above entitled matter and upon which appellant relies:

1. Complaint.
2. Answer.
3. Notice of Motion for Continuance.
4. Affidavit of Edward K. Zuckerman in Support of Motion for Continuance.
5. Notice of Motion for Dismissal.
6. Affidavit of Joseph F. Rank in Support of Motion for Dismissal.
7. Minute Order of September 22, 1941.
8. Order of Dismissal entered in Civil Order Book 6, page 634.
9. Notice of Motion to Vacate Order for Dismissal, for Leave to File an Amended Complaint and for Leave to Realign Parties Defendant as Parties Plaintiff or, in the Alternative, to Dismiss as to Certain Defendants.
10. Affidavit of Arthur Edmund Stein in Support of Motion to Vacate Order of Dismissal, for Leave to File an Amended Complaint and for Leave to Realign Parties Defendant as Parties Plaintiff or, in the Alternative, to Dismiss as to Certain Defendants.
11. Affidavit of Joseph F. Rank in Response to Affidavit of Arthur Edmund Stein in Support of Motion to Vacate Order of Dismissal, etc.

12. Proposed First Amended Complaint.
13. Minute Order of November 3, 1941.
14. Notice of Appeal.
15. Statement of Points and Designation of the Parts of the Record Necessary for the Consideration Thereof.

Dated: January 12, 1942.

ZUCKERMAN AND STEIN,  
By ARTHUR EDMUND STEIN,  
ARTHUR EDMUND STEIN,  
Attorneys for Plaintiff and  
Appellant.

State of California,  
County of Los Angeles—ss.

H. Goodman, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles: that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is 1017 Pacific National Bldg., Los Angeles, California; That on the 12th day of January, A. D., 1942, affiant served the within Statement of Points and Designation of the Parts of the Record, etc. on the Assignee of Interest of Certain defendants in said action, by placing a true copy thereof in an envelope addressed to Mr. Samuel I. Barchas at the business address of said Samuel I. Barchas, as follows: Mr. Samuel I. Barchas, 1031 South Broadway, Los Angeles, Cali-



fornia, and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California; That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

H. GOODMAN

Subscribed and Sworn to before me this 12th day of January, 1942.

(Seal)

E. K. ZUCKERMAN,

Notary Public in and for said  
County and State.

My Commission Expires June 20, 1945.

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(AFFIDAVIT OF SERVICE BY MAIL—  
1013a, C. C. P.)

State of California,  
County of Los Angeles—ss.

H. Goodman, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the county of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within above entitled action; that affiant's business address is 1017 Pacific National Bldg., Los Angeles, California; that on the 12th day of January, 1942, affiant served the within Statement of Points and Designation of the Parts of the

Record, etc. on the Defendant and Appellee in said action, by placing a true copy thereof in an envelope addressed to the attorney of record for said Defendant and Appellee at the office address of said attorney, as follows: "Mr. Joseph F. Rank, Attorney at Law, 649 South Olive Street, Los Angeles, California"; and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, where is located the office of the attorney for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

H. GOODMAN

Subscribed and sworn to before me this 12th day of January, 1942.

(Seal)

E. K. ZUCKERMAN,

Notary Public in and for the  
County of Los Angeles, State  
of California.

My Commission Expires June 20, 1945.

[Endorsed]: Filed Jan. 15, 1942. Paul P. O'Brien,  
Clerk.